

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:20-CR-19 JCM (NJK)

Plaintiff(s),

ORDER

v.

BARRY ALLEN GABELMAN,

Defendant(s).

Presently before the court is defendant Barry Gabelman (“defendant”)’s motion for judgment of acquittal. (ECF No. 148). The government responded. (ECF No. 149).

Also before the court is defendant’s pro se motion to withdraw [sic]. (ECF No. 139). No response was filed, and the time to do so has passed.

I. INTRODUCTION

Defendant was indicted on February 4, 2020, and charged with, *inter alia*, coercion and enticement in violation of 18 U.S.C. § 2422(b). Following a three-day jury trial, defendant was found guilty on February 9, 2022. Defendant’s sentencing hearing is set for January 27, 2023. As of July 7, 2022, defendant and his counsel had limited communication. Since then, counsel has filed several documents and a motion on behalf of defendant. Defendant now moves the court to dismiss his counsel and appoint new counsel as well as set aside the verdict and enter a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29.

...

1 At trial, the government presented evidence of the following.

2 Beginning in October 2019 until his arrest on December 6, 2019, defendant was
3 communicating with an undercover Federal Bureau of Investigation agent posing to be a father
4 (“Cam”) and his eleven-year-old daughter (“Ellie”). During these communications, defendant
5 sent pictures of male genitalia to Ellie, requested nude photographs of Ellie’s genitalia, and
6 discussed with Cam and Ellie sexual acts he would perform with Ellie. Defendant also asked
7 Cam multiple times if he was in law enforcement.
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9 Defendant agreed to meet with Cam and Ellie at a recreational vehicle (“RV”) in a
10 predetermined location on December 6, 2019. Cam requested that defendant bring Malibu rum
11 and a small gift for Ellie, but defendant declined citing his lack of financial resources. When
12 Cam mentioned he already had Bacardi rum in the RV, defendant encouraged Cam to give some
13 to Ellie to help her relax. Cam also requested defendant wear a condom during his encounter
14 with Ellie, and defendant replied that he would do so.
15

16 When FBI agents confronted defendant at the RV, he informed them that he was there to
17 discuss purchasing an RV. A cell phone and a condom were found on his person. Defendant
18 consented to a search of his cell phone, which revealed the images defendant sent to Ellie as well
19 as the alleged conversations he had with Cam and Ellie. He also consented to a search of his
20 apartment, which revealed no child pornography or further evidence.
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22 **II. LEGAL STANDARD**

23 *a. Rule 29 Acquittal*

24 Rule 29(c) permits a defendant to move for a judgment of acquittal within fourteen days
25 of a guilty verdict. Fed. R. Crim. P. 29(c). The standard relies on the sufficiency of evidence
26 presented at trial. *See United States v. Stoddard*, 150 F.3d 1140, 1144 (9th Cir. 1998). If the
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1 evidence, viewed in the light most favorable to the prosecution, is so insufficient that no
 2 “rational juror could conclude that the government proved its case beyond a reasonable doubt,”
 3 the court may set aside the jury verdict and enter an acquittal. *See* Fed. R. Crim. P. 29(c); *United*
 4 *States v. Shetler*, 665 F.3d 1150, 1163–64 (9th Cir. 2011); *United States v. Dinkane*, 17 F.3d
 5 1192, 1196 (9th Cir. 1994).

7 *b. Motion to Withdraw*

8 Local Rule IA 11-6(e) provides that “[e]xcept for good cause shown, no withdrawal or
 9 substitution will be approved if it will result in delay of discovery, the trial, or any hearing in the
 10 case.” Because the Sixth Amendment guarantees criminal defendants the right to “reasonably
 11 effective” assistance of counsel, defendant must demonstrate that his current counsel is
 12 reasonably ineffective to warrant dismissal and appointment of new counsel. *See Strickland v.*
 13 *Washington*, 466 U.S. 668, 687 (1984).

15 **III. DISCUSSION**

16 *a. Rule 29 Acquittal*

17 Defendant was found guilty of coercion and enticement of a minor in violation of 18
 19 U.S.C. § 2422(b). To warrant a judgment for acquittal, defendant’s instant motion must
 20 demonstrate that no rational trier of fact could conclude each element of the crime was proven
 21 beyond a reasonable doubt with the evidence presented at trial. *See* Fed. R. Crim. P. 29(c);
 22 *Shetler*, 665 F.3d at 1163–64; *Dinkane*, 17 F.3d at 1196. The elements of the crime are (1) the
 23 defendant used a means of interstate commerce to knowingly persuade, induce, entice, or coerce
 24 an individual to engage in a criminal sexual activity; (2) the defendant believed the individual
 25 has not attained the age of eighteen; and (3) the defendant took a substantial step toward
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1 committing the crime that corroborates the defendant's intent to commit the crime. *See* 18
 2 U.S.C. § 2422(b); *United States v. Goetzke*, 494 F.3d 1231, at 1234–35 (9th Cir. 2007).

3 Defendant argues the evidence showing his intent to commit the crime falls short. (ECF
 4 No. 148). To support his argument, defendant points to several pieces of evidence: (1) his own
 5 testimony he was attempting to catch a pedophile; (2) the fact that he did not bring the requested
 6 rum or small gift for Ellie; (3) and a lack of other evidence.¹ (*Id.*). This is unpersuasive.

8 Though defendant claims his intentions were to catch Cam, when he arrived at the
 9 location to meet Cam and Ellie, he told officers he was there to purchase an RV rather than
 10 assisting law enforcement in catching a predator. (ECF No. 149). Moreover, defendant told
 11 Cam before the meet-up he would not be bringing any gifts because of a lack of financial
 12 resources. (*Id.*). Finally, the lack of direct evidence as to defendant's intent is entirely
 13 outweighed by the other evidence presented by the government. To wit, the pictures of genitalia
 14 that defendant sent to Ellie, the nude photographs he requested from Ellie, thirty-six days of
 15 messages detailing sexual acts he would perform on or with her, and encouraging Cam to have
 16 Ellie consume alcohol to relax on the day of the meet-up all support intent to commit the crime.
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19 Concluding beyond a reasonable doubt that all elements of the crime charged were met
 20 here is not out of the realm of rationality. Defendant did not make the requisite showing that no
 21 “rational trier of fact could have found the essential elements of the crime beyond a reasonable
 22 doubt.” *See Shetler* 665 F.3d at 1163.

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 28 ¹ Specifically, defendant submits that no FBI agent specifically testified as to defendant's intent, there was nothing found in defendant's phone or dwelling that proved intent, and that the condom he had on his person was part of his normal behavior and thus not indicative of his intent at the time of his arrest.

1 *b. Motion to Withdraw*

2 Defendant's ill-named motion argues he has been unable to communicate with his court-
 3 appointed attorney, Daniel Hill, esq., and requests Mr. Hill be dismissed and a new attorney
 4 appointed. Since the filing of defendant's motion, however, Mr. Hill has filed stipulations and a
 5 motion for acquittal on defendant's behalf. (ECF Nos. 145, 148, 150). Without more, brevity of
 6 communication between a defendant and his counsel does not warrant a finding of ineffective
 7 assistance of counsel. See *U.S. v. Lucas*, 873 F.2d 1279, 1280 (9th Cir. 1989) (citing *Murray v.*
 8 *Maggio*, 736 F.2d 279, 282 (5th Cir. 1984)).

9 Defendant's sentencing hearing is currently scheduled for January 27, 2023. Mr. Hill has
 10 been adequately representing defendant since his appointment, and a change in counsel would
 11 unnecessarily delay proceedings. Therefore, the court finds it appropriate for Mr. Hill to
 12 continue representing defendant for the remainder of his criminal proceedings pursuant to 18
 13 U.S.C. § 3006A, absent a future finding by the court to grant dismissal or substitution of counsel
 14 for good cause.

15 **IV. CONCLUSION**

16 Accordingly,

17 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant's motion for
 18 acquittal (ECF No. 148) is DENIED with prejudice.

19 IT IS FURTHER ORDERED that defendant's motion to withdraw (ECF No. 139) is
 20 DENIED.

21 DATED January 27, 2023.

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 23 UNITED STATES DISTRICT JUDGE